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No. 89-908

In The

Supreme Court of the United States

October Term, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA,
and
AUTO CLUB INSURANCE ASSOCIATION,
Petitioners,

v.

WILLIAM J. BULLOCK,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

WHEN A PURPORTED IMPASSE OCCURS IN THE NEGOTIATIONS FOR A FIRST COLLECTIVE BARGAINING AGREEMENT, MAY THE EMPLOYER UNILATERALLY VOID PRE-EXISTING INDIVIDUAL EMPLOYMENT CONTRACTS BY DEPRIVING A STATE COURT OF JURISDICTION TO ENFORCE SUCH INDIVIDUAL CONTRACTS ON THE PURPORTED GROUNDS THAT THE NATIONAL LABOR RELATIONS ACT, 29 USC § 151 *ET SEQ.*, PREEMPTS SUCH STATE COURT JURISDICTION?

The Petitioners Answer "Yes."

The Respondent Answers "No."

The Michigan trial court Answered "No."

The Michigan Court of Appeals Answered "No."

The Michigan Supreme Court Answered "No."

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF FACTS:

A. Background Facts 1

B. The Michigan Supreme Court's Decision In *Bullock* 4

REASONS FOR DENYING THE WRIT:

I. AN EMPLOYER'S RIGHT TO UNILATERALLY VOID ITS PRIOR CONTRACTUAL COMMITMENTS HAS BEEN REPUDIATED BY THE COURT. 6

A. The Court Has Carefully Reserved The Right Of Employees To Enforce Individual Contracts Prior To The Advent Of A Collective Bargaining Agreement. .. 6

B. The Court Has Carefully Reserved The Rights Of The States To Establish Minimum Conditions Of Employment. 10

II. THE RECORD IS NOT SUFFICIENTLY DEVELOPED FOR REVIEW. 12

III. THE ISSUE PRESENTED IS TOO NARROW TO JUSTIFY REVIEW. 13

IV. THE MICHIGAN SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF SEVERAL FEDERAL COURTS OF APPEAL. 15

CONCLUSION 17

TABLE OF AUTHORITIES

PAGE

CASES:

Automobile Club of Michigan, 237 NLRB 379 (1978), *enforced*, 631 F.2d 82 (6th Cir. 1980) .. 2-3

Belknap, Inc. v *Hale*, 463 U.S. 491 (1983) ... 5, 8, 9

Bullock v *Automobile Club of Michigan*, 432 Mich 472, 444 NW2d 114 (1989) 4, 11, 15, 16

Derrico v *Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988) 16

Garner v *Teamsters*, 346 U.S. 485 (1953) 7

H. J. Heinz v *Labor Board*, 311 U.S. 514 (1941) ... 9

J. D. Alexander v *Standard Oil Co.*, 53 Ill App 3rd 690, 368 NW2d 1010 (5th Dist. 1977) 14

J. I. Case v *NLRB*, 321 U.S. 332 (1944) .. 5, 6, 7-8, 9, 14

Machinists v *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) 5, 8

Maushund v *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986) 15

Metropolitan Life Insurance Co. v *Massachusetts*, 471 U.S. 724 (1985) 6, 10-11

NLRB v *Jones & Laughlin*, 301 U.S. 1 (1936) 9

NLRB v *Sands*, 306 U.S. 332 (1939) 9

National Licorice v *NLRB*, 309 U.S. 350 (1939) 6, 7, 9

National Metalcrafters, Division of Keystone Consolidated Industries v *McNeil*, 784 F.2d 817 (7th Cir. 1986) 15

Parker v *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989) 16

PAGE

Perry v *Sinderman*, 408 U.S. 593 (1972) 13

Roberts v *Automobile Club of Michigan*, 138 Mich App 488, 360 NW2d 224 (1984), *leave to appeal denied*, 424 Mich 867 (1986), *cert. denied*, 479 U.S. 889 (1986) 5-6, 9

San Diego Building Trades Council v *Garmon*, 359 U.S. 236 (1959) 5

Sears, Roebuck & Co. v *Carpenters*, 436 U.S. 180 (1978) 5

Serrano v *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) 16

Taggart v *Weinacker's Inc.*, 397 U.S. 223 (1970) 11

Toussaint v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 292 NW2d 880 (1980) 1

MISCELLANEOUS:

Elliott-Larsen Civil Rights Act, MSA 3.548(101); MCLA 37.2201 *et seq.* 11-12

Michigan Court Rules of 1985:
Rule 2.118 3
Rule 2.118(1) 3
Rule 2.118(4) 4

Michigan General Court Rules of 1963:
Rule 110.1 3
Rule 116.1(2) 13
Rule 118.1 3
Rule 118.4 4

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* . . . . . i, 2, 6, 15-16

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BRIEF IN OPPOSITION
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COUNTER-STATEMENT OF FACTS

A. Background Facts

Respondent William J. Bullock was hired as an insurance sales agent by the Auto Club of Michigan in 1968. There was no union for the sales agents when he was hired. At the time of his hire he was made certain express oral promises regarding his employment. These oral promises are enforceable in contract under Michigan law, *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 292 NW2d 880 (1980).

Bullock was promised that he would never be fired unless he stole (just-cause), that he would be paid seven percent commission on all new and renewal insurance sales, and that he could earn a very substantial income

if he were to work hard and build up his "book of business." The "book" is the accumulated new and renewal insurance business from which an insurance agent derives his commission income (App 79a-80a).

Bullock worked very successfully as an insurance agent and developed a large book of business (App G, 75a).

In 1977, however, the Auto Club unilaterally announced to its sales agents that it was changing the method of compensation for new and renewal insurance sales. It announced a "unit compensation" system wherein a fixed amount would be paid for each coverage within a policy instead of the percentage commission originally promised (App G, 76a).

The new compensation plan was instituted on January 1, 1978 with the effects of the new compensation system not reaching respondent or his co-workers until July, 1978.

While the petitioners claim that the Auto Club implemented this new compensation formula after an impasse in bargaining (Pet 3), the Auto Club in fact changed the basis of respondent's compensation prior to any union certification and well prior to any bargaining.[1]

In particular, on February 7, 1978, following an election conducted pursuant to § 9 of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA), the NLRB certified the Michigan AAA Sales Association as the exclusive collective bargaining representative for AAA sales representatives in the Detroit area (App 21a). Bargaining, however, did not commence until 1980, when the Sixth Circuit ordered it. See *Automobile*

[1] This, in itself, illustrates how untimely and improvident is petitioners' petition. There is no official record of when unit compensation was implemented.

Club of Michigan, 237 NLRB 379 (1978), *enforced*, 631 F2d 82 (6th Cir. 1980).

In 1981, after the Auto Club and the union had bargained for some period of time, the Auto Club declared an impasse and imposed a set of "minimum production standards" on its sales representatives. These minimum production standards included a disciplinary procedure whereby sales representatives who failed to meet prescribed production standards would receive, in progressive sequence, an oral warning, a written warning, probation and ultimately discharge (App A, 21a).

Incident to discharge was the fact that the Auto Club would confiscate the books of business that the Branch Commission Sales Representatives had developed (App G, 77a). The ownership of this Auto Club book of business developed by respondent is a central issue in dispute in this litigation.

Bullock allegedly failed to meet the minimum production standards implemented subsequent to the final offer of the company and was discharged in February 1982.

Subsequent to his discharge, Bullock filed suit in Wayne Circuit Court, State of Michigan, alleging breach of contract *and* unjust enrichment (App G).

The Auto Club filed a motion for accelerated judgment as to the breach of contract claim only on NLRA preemption grounds. It ignored respondent's claim for unjust enrichment in its motion.

In addition, as the Auto Club's motions did not constitute responsive pleadings under the rules,[2] respondent

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[2] Under Michigan procedure, a plaintiff is permitted to amend his pleading within fourteen (14) days after being served with a responsive pleading by an adverse party. GCR 1963, 118.1; MCR 2.118(1). An answer (which may be combined with a cross claim or counter claim) is the only "responsive pleading to a complaint," which triggers the fourteen (14) day period. GCR 1963, 110.1; MCR 2.118.

was permitted to and did file a first amended complaint before a hearing on petitioners' motion. This first amended complaint alleged additional counts of conversion, age discrimination and negligent evaluation (App H). A second amended complaint was later filed adding a count of promissory estoppel and deleting the claim of negligent evaluation (App I).

Under Michigan procedure, the initial complaint's allegations were superseded by the subsequent amendments. GCR 1963, 118.4; MCR 2.118(4). However, petitioners did not amend their motion for accelerated/summary judgment (now summary disposition), preferring instead to pursue their attack on the now-superseded original complaint. This was later noted by the Michigan Supreme Court in its decision (App A, 19a).

In considering the Auto Club's motion for accelerated judgment, the state courts, as is proper under Michigan procedure, assumed that the well-pled allegations of the respondent's complaint were true. On the basis of those assumptions, the trial court denied the Auto Club's preemption claim but certified the question to the Michigan Court of Appeals. After granting application for leave to appeal from this interlocutory order, the Michigan Court of Appeals unanimously affirmed. The Auto Club next secured leave to appeal to the Michigan Supreme Court, which affirmed the Court of Appeals. *Bullock* v *Automobile Club of Michigan (AAA)*, 432 Mich 472 (1989).

B. The Michigan Supreme Court's Decision in *Bullock*

On the merits of Bullock's contract claim, the Michigan Supreme Court split three ways, with the majority supporting a remand for further developments of the factual record (App A). On the preemption issue, how-

ever, the Michigan Supreme Court unanimously joined Justice Levin's concurring opinion (App A, 7a-8a, 20a-28a, 39a).

Justice Levin denied the Auto Club's preemption claims under both the *Garmon* and *Machinists* doctrines. *San Diego Building Trades Council* v *Garmon*, 359 U.S. 236 (1959) and *Machinists* v *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

On the *Garmon* claim, the Michigan Supreme Court, following this Court's decisions in *Sears, Roebuck & Co.* v *Carpenters*, 436 U.S. 180 (1978) and *Belknap, Inc.* v *Hale*, 463 U.S. 491 (1983), held that state jurisdiction was not preempted because ". . . the substance of Bullock's state law claims differ significantly from any claims he could have presented at the NLRB" (App A, 25a). In particular, as the Court held, the state law claims involve a determination of the "terms of Bullock's employment contract" and whether that contract had been breached, while the NLRB claim would focus on the "process of bargaining between the union and the Auto Club" (App A, 25a).

On the *Machinists* claim, the Michigan Court, following this Court's opinions in *J. I. Case* v *NLRB*, 321 U.S. 332 (1944) and *Belknap, Inc.* v *Hale*, *supra*, held that federal labor law had not granted an employer the power to unilaterally void pre-existing individual contracts in the absence of any collective agreement (App A, 27a-28a).

After the Michigan Supreme Court denied the Auto Club's motion for rehearing, the petitioners filed the instant petition for a writ of certiorari.[3]

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[3] This is actually petitioners' second petition for a writ of certiorari on the same facts. The first petition in *Automobile Club*

(concluded on page 6)

REASONS FOR DENYING THE WRIT

I.

AN EMPLOYER'S RIGHT TO UNILATERALLY VOID ITS PRIOR CONTRACTUAL COMMITMENTS HAS BEEN REPUDIATED BY THE COURT.

A. The Court Has Carefully Reserved The Right Of Employees To Enforce Individual Contracts Prior To The Advent Of A Collective Bargaining Agreement.

As the Court held, the purpose of the Wagner Act was to remedy "[t]he inequality of bargaining power between employees who do not possess . . . actual liberty of contract, and employers who are organized in corporate or other forms of organization." *Metropolitan Life Insurance Co.* v *Massachusetts*, 471 U.S. 724 (1985) [quoting 29 U.S.C. § 151].

Consistent with that purpose, the Court in the early years of the Wagner Act twice struck down employers' attempts to use individual contracts as a means to avoid reaching a collective agreement. *National Licorice* v *NLRB*, 309 U.S. 350 (1939); *J. I. Case* v *NLRB*, *supra*. In those cases, the Court carefully noted that an employer could not use collective bargaining as an excuse to unilaterally void whatever individual contract rights employees might have obtained. *Id.* Insofar as petitioners now argue that respondent had forfeited his

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(*continued from page 5*)

of Michigan, et al. v *Clifford Roberts, et al.*, S. Ct. No. 85-1731, was denied 479 U.S. 889 (1986). The Michigan Supreme Court's holding in *Bullock* is essentially an affirmance of the Michigan Court of Appeals' holding in *Roberts* v *Automobile Club of Michigan*, 138 Mich App 488, 360 NW2d 224 (1984), *leave to appeal denied*, 424 Mich 867 (1986). The Michigan Court of Appeals' decision in *Bullock* had by reference adopted the *Roberts* Court of Appeals decision.

right to enforce individual contracts by selecting a bargaining representative, that argument is foreclosed by these two seminal decisions of this Court.

In particular, in *National Licorice, supra,* the National Labor Relations Board had struck down the employer's attempt to use individual contracts as a shield against collective negotiations. As a remedy, the Board ordered all such contracts voided. While affirming the basic Board decision, the Court very carefully noted the continuing role of individual employment contracts in industries covered by the NLRA and modified the Board's order so as not to ". . . foreclose the employees from taking any action to secure an adjudication upon the [individual] contracts . . ." *National Licorice* v *NLRB, supra,* 309 U.S. at 365.

Four years later, in an opinion by Justice Jackson, the Court unanimously reaffirmed the continuing validity of individual employment contracts in the absence of a collective bargaining agreement. *J. I. Case* v *NLRB, supra.* As Justice Jackson was an early architect of the preemption doctrine,[4] the courts below quite properly paid special attention to his words:

> "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, *not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment,* because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue to work

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[4] See *Garner* v *Teamsters,* 346 U.S. 485 (1953).

> after a collective bargaining agreement expires and, despite negotiations in good faith, *the negotiations may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.*" *J. I. Case* v *NLRB, supra,* 321 U.S. at 336-337 (emphasis added).

Only six years ago, this Court relied extensively on Justice Jackson's opinion in *J. I. Case* to reaffirm the continuing vitality of individual employment contracts in industries covered by the NLRA and to reject the argument that the NLRA created some privilege to unilaterally void such contracts. *Belknap* v *Hale, supra,* 463 U.S. at 491, 500, 506-507, 511-512 (1983). In *Belknap,* as here, the employer sought to avoid state court jurisdiction by claiming that state breach of contract suits would "upset the delicate balance of forces established by federal law" and should therefore be preempted under *Machinists* v *Wisconsin Employment Relations Commission, supra.* In *Belknap,* as here, the employer claimed that it should be allowed to use its "economic weapons" free from any restraint imposed by its prior promises.

The *Belknap* Court found "mystifying" the employer's argument that state law should not "burden" the employer's "economic weapons" by enforcing the employer's otherwise valid promises. *Belknap* v *Hale, supra,* 463 U.S. at 500. While *Belknap* involved different plaintiffs and a different "economic weapon" (economic replacements), the employer here is advancing precisely the same argument and the result is equally mystifying. The employer seeks to convert an act designed to assure employees "actual liberty of contract" into a license for an employer to unilaterally breach its own voluntary, pre-existing contracts with employees.

Petitioners' attempt to justify this perverse result by implying that the employer's claimed right to unilaterally implement an offer contravening pre-existing individual contracts derives, somehow, from the Taft-Hartley Act (Pet 18-19). But this is not the case, for the employer's right to take unilateral action was recognized well before Taft-Hartley. See, e.g., *H. J. Heinz* v *Labor Board*, 311 U.S. 514, 525-526 (1941); *NLRB* v *Sands*, 306 U.S. 332 (1939); *NLRB* v *Jones & Laughlin*, 301 U.S. 1, 45 (1936). As the Michigan Court of Appeals held in a case very similar to the present case:

> "Although enforcement of an employment contract may have an incidental effect on the collective-bargaining process, the employer's right to implement its final offer emanates from its common-law, entrepreneurial right to run its business. However, the employer's common-law right of an employer to implement its final offer must be seen as limited by the employer's common-law duty to honor its contracts of employment. We believe that this is the appropriate accommodation of the parties' rights. A similar accommodation was found in *Belknap*, supra." *Roberts* v *Automobile Club of Michigan*, 138 Mich App 488, 500 (1984), *leave to appeal denied*, 424 Mich 867 (1986), *cert. denied*, 479 US 889 (1986).

The respondent here claims that years before the certification of a collective bargaining representative, the Auto Club voluntarily entered into contractual commitments with him. As this Court stated in *National Licorice*, *J. I. Case* and *Belknap*, the employer may not convert the NLRA into a means for unilaterally voiding those pre-existing contractual commitments. There is no need now for this Court to reconsider those very sound decisions.

B. The Court Has Carefully Reserved The Rights Of The States To Establish Minimum Conditions Of Employment.

As the Michigan Supreme Court unanimously held, the selection of a union representative did not instantly extinguish Bullock's state law claims or contract rights. Employees would hesitate to cast their lot with a union if they were deemed to have forgiven their common-law contract and other claims when a collective bargaining agent was certified without regard to whether a collective bargaining agreement is entered into (App A, 27a).

In recent years, this Court has held that the states have long been permitted, under the federal labor scheme, to enforce minimum labor standards. Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining process that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. *Metropolitan Life Insurance Co.* v *Massachusetts*, 471 U.S. 724, 755 (1985).

Although *Metropolitan Life Insurance Co.* v *Massachusetts, supra*, involves state legislation of mental health benefits, the rationale of the case is applicable here. There, the Court recognized that the end product of the collective bargaining process, the collective bargaining agreement, cannot be used to exclude unionized workers from certain minimum standards established by the State. As the Court stated:

> "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from

> state labor regulations imposing minimal standards on non-union employers." *Id.*, at 756.

Likewise, there is no reason to give the Auto Club of Michigan the right to unilaterally impose its last offer on the employees when that offer violated the employment contracts of both its Detroit area workers, covered by a union, and its non-unionized outstate workers. If this were done it would deprive the unionized employees of their right to sue, while allowing the non-Detroit area workers remedies in state court. If the Detroit area workers had ratified a contract, the situation would be different but that did not occur.

The Court in *Metropolitan* further stated:

> "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. 'A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action . . . and would thereby artificially *create* a no-law area.'" *Metropolitan Life Insurance Co., supra*, 471 U.S. at 757, quoting *Taggert* v *Weinacker's Inc.*, 397 U.S. 223, 228 (1970) (concurring opinion) (emphasis in original).

The *Bullock* holding does no more than establish that an employee, as a prerequisite to certifying a collective bargaining agent, need not grant the employer the right to unilaterally void state contract rights.

Here, along with enforcing his contract right, Bullock is attempting to prevent the unjust enrichment of the Auto Club of Michigan, protect his property right in his book of business, and stop age discrimination under the Michigan Elliott-Larsen Civil Rights Act, MSA 3.548

(101); MCLA 27.2201 *et seq.* Clearly, the Auto Club should not be allowed to "turn the policy that animated the Wagner Act on its head" by claiming that certification of a union granted the eventual right to unilaterally deprive employees of state property rights and, implicitly, to practice age discrimination by engaging in collective bargaining and then unilaterally implementing an agreement violative of those rights.

II.

THE RECORD IS NOT SUFFICIENTLY DEVELOPED FOR REVIEW.

This Court should deny the Writ as the record below is largely undeveloped and ill-suited for review. Little discovery has been taken and there is no court testimony. In discussing the state law contract claim on its merits the Michigan Supreme Court noted several times that the record was ill-suited for appellate review (App 12a-14a).

Moreover, petitioners in their motion attacked only part of respondent's original complaint and failed to amend their motion to respond to the amended complaints filed by respondent.[5]

Respondent's initial complaint in this action alleged two counts — breach of contract and unjust enrichment. The Auto Club responded to this complaint with a motion for accelerated judgment as to the breach of

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[5] Petitioners note that virtually identical lawsuits have produced state court jury verdicts. The verdicts described have been for age discrimination as well as breach of contract in all but one instance. They also include verdicts in areas where no collective bargaining representative was certified. There is no record to support petitioners' allegations regarding the facts alleged in petitioners' footnote (Pet at 13).

contract claim *only*, under the then-existing Michigan General Court Rules of 1963, GCR 116.1(2).

With the petitioners' motion attacking only the contract count of respondent's original complaint, review at this point would result in an extremely truncated decision in this case. On this record, the petitioners have not attacked the property rights claim or age discrimination claim of respondent in his first and second amended complaints. But those two claims assert that the minimum production standards violate respondent's property rights in his "book" and his right to be free from age discrimination.

The interaction and interdependence of these claims in this litigation is so overwhelming that to isolate the contract claim without reference to any of the other claims would produce a skewed analysis of the facts. Moreover, whatever the Court's ruling on this petition, the respondent would proceed with what on this record are factually undeveloped claims relating to ownership of property (the book of business developed by respondent) and age discrimination (the creation of distinctly harsher work standards for respondent and his co-workers with a relaxed set of performance standards for younger, newly-hired workers who are also fully licensed sales agents of the Auto Club).

III.

THE ISSUE PRESENTED IS TOO NARROW TO JUSTIFY REVIEW.

Petitioners do not dispute that the enforcement of individual contracts for employment has long been with the states. *Perry* v *Sinderman*, 408 U.S. 593, 602 n. 7 (1972). Nor do petitioners contend that the mere advent of a union would disturb these contracts. Nor,

for his part, does respondent dispute that a collective bargaining contract would ordinarily supersede individual agreements. *J. I. Case* v *NLRB*, 321 U.S. 332 (1943). The dispute here is limited to one extremely narrow issue: the ability of the employer to void pre-existing individual employment contracts after a union has been certified and has bargained to impasse but before it has reached even a first collective bargaining agreement.

Petitioners suggest that with the decision below the "Michigan Court has effectively rewritten and nullified the Federal Scheme" (Pet at 12). Yet, other than litigation between the Auto Club and its discharged sales agents, petitioners are unable to cite a solitary case which involves the issue of post-certification, pre-first contract enforcement of individual contracts.

Respondent has found only one other lower court precedent related to the question here. See *J. D. Alexander* v *Standard Oil Co.*, 53 Ill App 3rd 690, 368 NW2d 1010 (5th Dist. 1977). As here, the court concluded that otherwise enforceable individual contracts do not become unenforceable merely because the employer has bargained to impasse with the union.

Alexander, however, did not address the precise issue presented here since it did not involve the pre-first contract negotiation and since it involved the relatively rare situation where the collective bargaining agreement incorporated individual "side agreements." Even so, *Alexander* illustrates respondent's position: the issue presented is very narrow, and the principles for resolving that issue are well-established in this Court's prior decisions.

This extremely narrow issue is constricted even more by respondent's claims of property rights in the "book

of business" developed by him which was confiscated by the Auto Club after imposition of the "minimum production standards" and discharge of respondent for failure to meet those standards. Respondent has in his original and amended complaints alleged counts of "conversion" and "unjust enrichment" in regard to this confiscation.

This confiscation, through assertion of exclusive property rights in the book of business by the Auto Club, was certainly done under principles of state property law. No argument has been made that there is any justification for this confiscation under principles of NLRA preemption, yet what the Auto Club has done under state law, it defends on the basis of federal labor law preemption.

IV.

THE MICHIGAN SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF SEVERAL FEDERAL COURTS OF APPEAL.

AAA attempts to characterize several post-1986 cases as being in conflict with the *Bullock* decision. These alleged conflicts do not actually exist.

National Metalcrafters, Division of Keystone Consolidated Industries v *McNeil*, 784 F.2d 817 (7th Cir. 1986) involved the application of an Illinois wage payment statute to require the employer to pay vacation benefits under terms of an *expired collective bargaining agreement*. This was held preempted by § 301 of the Taft-Hartley Act and § 8 of the NLRA.

Maushund v *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986) involved an employee working under an *existing collective bargaining agreement*. He sued for breach of an alleged oral contract with the employer.

The Sixth Circuit held there was total preemption where there was a collective bargaining agreement in existence covering this employee.

Derrico v *Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988) was a situation where an employee working after the *expiration of a collective bargaining agreement* alleged this expired collective bargaining agreement supplied the terms of an implied contract under state law. His claim under state law was held preempted.

Serrano v *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) involved employees working under an *existing collective bargaining agreement* who brought fraud claims for alleged misrepresentations by the employer regarding rebuilding coke plants. Preemption was based on a collective bargaining agreement provision that the employer had the right to decide whether to rebuild the coke plant.

Parker v *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989) involved former employees who had been working under an *existing collective bargaining agreement* who brought state law fraud claims alleging the company misrepresented that it would keep the steel plant open if employees granted concessions. Preemption was based on NLRA § 8's requirement of good faith bargaining.

The cases cited by petitioners are so factually distinguishable from the post-certification/pre-first contract issue decided in *Bullock* as to be irrelevant. They provide no justification for any claim of conflict between *Bullock* and these several federal courts of appeal decisions.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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